89-702

No. _____

SUPREME COURT, U.S.
FILED
OCT 26 1989
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1989

CHAMPION MORTGAGE COMPANY, a California Corporation,

Petitioner,

v.

LAKE TRAVIS ISLAND, LTD.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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57 pp

QUESTION PRESENTED

Whether, consistent with the Due Process Clause of the Fourteenth Amendment and the decisions of this Court in *International Shoe Company v. State of Washington* and its progeny, a Rule 12(b)(2) motion to dismiss for lack of *in personam* jurisdiction can be decided by applying a *prima facie* burden of proof when there are significant factual disputes relevant to *in personam* jurisdiction.

LIST OF PARTIES

The parties to the proceedings below were the petitioner Champion Mortgage Company, a California Corporation, and respondents Lake Travis Island, Ltd..

Petitioner Champion Mortgage Company has no parent companies, subsidiaries, or affiliates to list pursuant to Rule 28.1.

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CHAMPION MORTGAGE COMPANY, a California Corporation,

Petitioner,

v.

LAKE TRAVIS ISLAND, LTD.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner Champion Mortgage Company respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Fifth Circuit which became final on June 28, 1989. The decision affirms the order of the United States District Court for the Western District of Texas denying petitioner's motion to dismiss for lack of *in personam* jurisdiction. Petitioner's motion to dismiss was made pursuant to Rule 12(b)(2) of the Federal Rules of Civil Procedure. The District Court held that Texas' exercise of *in personam* jurisdiction over petitioner comported with the dictates of the Due Process Clause of the Fourteenth Amendment.

In reaching its conclusion affirming the District Court's order, the Court of Appeals, in a summary opinion, relied upon its own decision in *D.J. Investments v. Metzeler Motorcycle Tire*, 754 F.2d 542 (5th Cir. 1985).

On September 13, 1989, Justice Byron R. White signed an order granting petitioner's application for an extension of time to and including October 26, 1989 within which to file its petition for writ of certiorari.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit has not been reported. It is reprinted in Appendix A hereto.

The order of The United States District Court for the Western District of Texas (Nowlin, D.J.) has not been reported. It is reprinted in Appendix B hereto.

JURISDICTION

In the Court of Appeals and District Court, petitioner contended that the State of Texas' exercise of *in personam* jurisdiction over petitioner violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on June 28, 1989. The jurisdiction of this court to review the decision of the Court of Appeals is invoked under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourteenth Amendment to the United States Constitution provides:

> Section 1 . . . nor shall any state deprive any person of . . . property, without due process of law. . . .

Rule 12(b)(2) of the federal Rules of Civil Procedure provides:

> Every defense, in law or fact, to a claim for relief in any pleading . . . shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: . . . (2) lack of jurisdiction over the person. . . .

Rule 43(e) of the Federal Rules of Civil Procedure provides:

> (e) Evidence on Motions. When a motion is based on facts not appearing of record the court may hear the matter on affidavits presented by the respective parties, but the court may direct that the matter be heard wholly or partially on oral testimony or deposition.

STATEMENT OF THE CASE

Petitioner Champion Mortgage Company ("Champion") is a California corporation, with its principal place of business in San Diego, California. Champion provides Forward-End Loan Permanent Take-Out Commitments ("Commitment") to real estate developers and construction lending institutions.

Champion is often contacted by developers or brokers who request Champion to send an application to them. The developer completes the application and submits financial and marketing data along with a good faith deposit and site inspection fee to Champion. Champion evaluates the package, completes the site inspection, and then issues an offer to commit if it considers the development sound.

On or about August-September 1986, Champion was contacted in California by Lake Travis Island, Ltd. ("Lake Travis") through its agent Southland Mortgage Company ("Southland") of Irving, Texas. Greg Preston ("Preston") was Southland's mortgage broker handling the project. Lake Travis requested that Champion send an application for a loan commitment. Subsequent to the initial contact made by Lake Travis, Glen Reschke ("Reschke"), Senior Vice President of The Prime Group, Inc. ("Prime"), contacted Champion in California on behalf of Lake Travis and also requested an application for a loan commitment. Prime is the general partner of Lake Travis.

On or about September 3, 1986, Champion mailed an application to Reschke in response to his solicitation. The application mailed to Reschke was on Champion's forms. The application contained, *inter alia*, a choice of law and forum clause, specifying that in the event of litigation California law would apply and that San Diego, California would be the forum.

Reschke responded to Champion's application on or about September 29, 1986 by sending to Champion an application for a commitment using Prime's forms. The Prime application was essentially the same format as the

format used by Champion; however, the Prime application contained modifications to the terms offered by Champion's earlier application and omitted the choice of law and forum clause. The Prime application included schedules "A" and "B" which were wholly reproduced from Champion's application. The Prime application requested Champion to prepare and forward new applications for Reschke's execution if Champion agreed to Prime's terms and conditions.

On or about October 7, 1986, Champion mailed to Reschke another application, using Champion's forms. The choice of law and forum clause was included in the application. On or about October 14, 1986, Reschke sent to Champion a correspondence in which Prime objected to certain provisions of Champion's application. Prime suggested additional terms to Champion's application and identified issues it requested to be further defined and clarified. Prime did not object to or refer to the choice of law and forum clause.

Telephonic negotiations continued between Reschke and Champion after Prime's letter of October 14, 1986. As a result of those negotiations, Champion issued an offer for a loan commitment ("offer") to Lake Travis.

It was undisputed: that Champion had conducted no business in Texas; that it had no designated agent for the service of process in Texas; that it conducted no advertising in Texas; that it maintained no offices in Texas; that it had no employees or agents in Texas; that it did not solicit any kind of business in Texas; that it owned no real or personal property in Texas; and that no contract existed between Champion and Lake Travis.

On May 15, 1987, Lake Travis filed its Original Petition (case No. 418,526) in the District Court of Travis County, 147th Judicial District, in the State of Texas. Said Original Petition prayed for damages against Champion for Breach of Contract, Fraud, and Deceptive Trade Practice violations.

On May 26, 1987, Champion was served by the secretary of State of Texas with the Original Petition of Lake Travis.

On June 23, 1987, Champion filed a Petition for Removal to the United States District Court for the Western District of Texas, Austin Division ("District Court"). In addition, Champion filed a $500.00 bond for removal pursuant to 28 U.S.C. Section 1446(d). Thereafter, the case was removed from the Texas State court to the District Court.

On August 18, 1987, Champion filed in the District Court a Rule 12(b)(2) Motion to Dismiss for Lack of Personal Jurisdiction over Champion or, in the alternative, Transfer of the case to the United States District Court for the Southern District of California. Included with Champion's motion was an affidavit in support thereof. Champion's affidavit is reprinted in Appendix C hereto. In addition, Lake Travis filed an affidavit in opposition to Champion's motion to dismiss. Lake Travis' affidavit is reprinted in Appendix D hereto. On September 23, 1987, the District Court denied Champion's motion in its entirety. (Appendix B.)

On October 15, 1987, Champion moved the District Court for a permissive appeal pursuant to 28 U.S.C. Section 1292(b); and on that same day, Champion filed its

Answer to Lake Travis' complaint. On January 15, 1988, the District Court denied Champion's 1292(b) Motion.

On December 14, 1988, Final Judgment was entered against Champion in the District Court. On January 10, 1989, Champion filed its Notice of Appeal in the United States Court of Appeals for the Fifth Circuit.

On June 28, 1989, in a summary opinion, the Fifth Circuit Court of Appeals affirmed the District Court's judgment. (Appendix A.) In its exceedingly brief opinion, the Fifth Circuit relied solely upon its decision in *D.J. Investments, Inc. v. Metzeler Motorcycle Tire*, 754 F.2d 542 (5th Cir. 1985) ("*D.J. Investments*") to find that the State of Texas had *in personam* jurisdiction over Champion.

REASONS FOR GRANTING THE WRIT

1. THE DECISION OF THE COURT OF APPEALS FOR THE FIFTH CIRCUIT IN *D.J. INVESTMENTS*, UPON WHICH THE COURT BELOW RELIED, IS CONSTITUTIONALLY INFIRM AND IS IN DIRECT CONFLICT WITH THE SECOND AND NINTH CIRCUIT COURTS OF APPEALS' DECISIONS REGARDING THE BURDEN OF PROOF REQUIRED IN RULING ON A RULE 12(b)(2) MOTION TO DISMISS FOR LACK OF *IN PERSONAM* JURISDICTION

A. The Conflict Between The Fifth Circuit's Rule And Decisions Of The Second And Ninth Circuits

Although Rule 12(b)(2) of the Federal Rules of Civil Procedure ("FRCP") creates the device to dismiss an action for lack of *in personam* jurisdiction, it does not

define what burden of proof is required in order for a resident plaintiff to establish *in personam* jurisdiction over the non-consenting non-resident defendant. Moreover, no guidance is provided by Rule 43(e) of the FRCP which merely vests the federal courts with discretion to rule on a motion based upon affidavits presented or to order that oral testimony be presented.

Because of the broad language used in Rule 12(b)(2) and 43(e) and the lack of a prescribed burden of proof, the Circuit Courts of Appeals have developed their own burdens of proof to resolve factual disputes relevant to *in personam* jurisdiction. As demonstrated below, when there are significant factual disputes which are relevant to *in personam* jurisdiction, the distinguished Second and Ninth Circuits apply a preponderance of the evidence standard, whereas the Fifth Circuit applies a *prima facie* standard.

By the term significant factual disputes, the petitioner means when, for instance: the moving party is not making the Rule 12(b)(2) motion as a matter of course but is presenting the court with serious factual allegations as to why the court does not have *in personam* jurisdiction. This should be distinguished from the instance where the moving party is merely presenting the court with boilerplate motions and pleadings, but is not making any serious factual allegations to demonstrate the court's lack of *in personam* jurisdiction. In the latter instance, the court should dispose of the motion through a *prima facie* showing by plaintiff, whereas the former should be accorded the court's full consideration and be resolved by a preponderance of the evidence.

What follows is a discussion which will demonstrate the conflict that exists between the rule of the Fifth Circuit (*prima facie*) and the more enlightened decisions of the Second and Ninth Circuits (preponderance).

In the Second and Ninth Circuits, a court analyzing a Rule 12(b)(2) motion must wrestle with evidence presented by the moving and responding parties. When, for instance, affidavits are presented by the parties and there are no significant factual disputes relevant to *in personam* jurisdiction, the court makes its determination by a *prima facie* burden of proof. However, when the disputed facts become increasingly relevant to the determination of *in personam* jurisdiction, the court is presented with significant factual disputes and applies the preponderance of the evidence burden of proof. *Marine Midland Bank, N.A. v. Miller*, 664 F.2d 899, 904 (2nd Cir. 1981); *Visual Science, Inc. v. Integrated Communications*, 660 F.2d 56, 58 (2nd Cir. 1981); *Data Disc, Inc. v. Systems Technology Associates, Inc.*, 557 F.2d 1280, 1285-1286 (9th Cir. 1977). Implicit in the foregoing decisions is that the Second and Ninth Circuits recognize when a party is merely making a matter of course motion, in which case they apply the *prima facie* standard; whereas in the other instance, the courts recognize that there are in fact significant factual disputes relevant to the issue of *in personam* jurisdiction and thus apply the preponderance of the evidence standard.

Unlike the Second and Ninth Circuits, the Fifth Circuit applies a rigid and exclusive burden of proof regardless of the quantity or significance of the factual disputes – plaintiff merely needs to make a *prima facie* showing of *in personam* jurisdiction. *D.J. Investments*, 754 F.2d at 545-546; *Wyatt v. Kaplan*, 686 F.2d 276, 280 (5th Cir. 1982);

Union Carbide Corp. v. UGI Corporation, 731 F.2d 1186, 1189 (5th Cir. 1984); *Products Promotions, Inc. v. Cousteau*, 495 F.2d 483, 490-491 (5th Cir. 1974); *Jetco Electronic Industries v. Gardiner*, 473 F.2d 1228, 1232 (5th Cir. 1973). As demonstrated below, under the reasoning of the *D.J. Investments* line of cases, as applied in the court below, the resident plaintiff merely needs to make allegations of fraud which are supported by its affidavits and the result is the same: defendant's evidence will be disregarded and plaintiff will establish a *prima facie* showing of *in personam* jurisdiction over the non-consenting non-resident defendant. Such reasoning demonstrates the Fifth Circuit's misunderstanding of this Court's reasoning in the area of minimum contacts and constitutes a violation of due process.

The foregoing demonstrates that the Fifth Circuit is in conflict with the Second and Ninth Circuits with regard to the burden of proof required in deciding a Rule 12(b)(2) motion to dismiss for lack of *in personam* jurisdiction. More specifically, the Second and Ninth Circuits apply a preponderance of the evidence burden of proof where there exists a significant dispute of facts relevant to the establishment of *in personam* jurisdiction, whereas the Fifth Circuit requires a *prima facie* burden of proof. As demonstrated below, the Fifth Circuit's rule is inappropriate and itself a denial of due process.

B. The Effect Of The Fifth Circuit's Rule Is To Disregard This Court's Standards For Deciding Questions Of *In Personam* Jurisdiction By Avoiding Their Consideration

The Fifth Circuit has applied inappropriate procedural standards, with the effect of avoiding this Court's standards for deciding minimum contacts cases.

The reasoning of the Court of Appeals is as follows:

When ruling on a Rule 12(b)(2) motion by a defendant challenging *in personam* jurisdiction, the court should find jurisdiction if the plaintiff establishes a *prima facie* showing. The Court of Appeals has misconstrued this Court's teaching, confusing the trial court's dispositive resolution of the substantive constitutional question of minimum contacts with the standard used when, for instance:

> (a) the 12(b)(6) motion serves as the equivalent of a common law demurrer, challenging the legal sufficiency of a pleading, or
>
> (b) the court is ruling on a motion for summary judgment where the question is the *prima facie* sufficiency of proof of the non-mover, or
>
> (c) the court is ruling on a motion for directed verdict where the question is whether a reasonable trier could as a matter of law reasonably find for the non-moving party, or
>
> (d) the court is ruling on a motion for judgment *n.o.v.*, where the test is essentially the same as for directed verdict.

In all of the foregoing instances, the court's ruling is simply that the matter should go forward so that a trier of fact may resolve the weight of evidence and credibility of

witnesses or to determine whether the formal pleading is legally sufficient or whether the plaintiff's proof is entitled to the protections of the Seventh Amendment right of jury trial, but not whether the plaintiff should actually prevail.

In the case of a 12(b)(2) challenge to *in personam* jurisdiction, the trial court is asked to actually decide itself a substantive constitutional question. The issue is not one which will thereafter be determined by a trier of fact because the issue is one of Constitutional law for the court. To use a standard of *prima facie* showing by plaintiff is to rule that the evidence of the defendant is not to be considered, which is to confuse the burden of production with the burden of persuasion and constitutes a denial of the process due the defendant. According to the ruling of the Fifth Circuit Court of Appeals, in order for plaintiff to prevail on the issue of *in personam* jurisdiction, the plaintiff merely must make *pro forma* allegations that defendant perpetrated a fraud whose effects were experienced in the forum state and present its version of the evidence to that effect and it follows that, regardless of the evidence of the defendant, the plaintiff has established minimum contacts.

The research of petitioner does not indicate that this Court has ever decided whether the burden of persuasion of plaintiff is satisfied by preponderance of the evidence or a higher standard, such as the clear and convincing evidence standard, but both explicitly and implicitly this Court has made clear that the trial court must fully consider the evidence and weigh all factors which have been specified by this Court in such determinations.

In this case, the facts indicate: that a Texas resident (respondent) contacted a California resident (petitioner) in California to seek a loan on some Texas property; that they had correspondence and phone calls which do not satisfy this Court's standards for minimum contacts; that petitioner made a single visit to Texas to inspect the property; and that because the parties could not agree on a forum clause, no contract was made and no loan was granted. Respondent claims that petitioner committed "fraud" by retaining a non-refundable fee which respondent had sent to petitioner in California. The merits of the controversy should be decided in California where virtually all contacts occurred. The district court and the Court of Appeals have decided that it is constitutionally permissible to hale petitioner into a Texas court because respondent's allegations and affidavits provide it with an irrebuttable presumption of *in personam* jurisdiction.

To the contrary, this Court's rulings in every case from *International Shoe Company v. State of Washington*, 326 U.S. 310 (1945) (*"International Shoe"*) to *Asahi Metal Co., Ltd. v. Superior Court*, 480 U.S. 102 (1987) (*"Asahi"*) explicitly and implicitly show that the trial court in deciding a question of *in personam* jurisdiction must itself weigh all of the factors involved in such a decision and necessarily must weigh all of the evidence before it. The Fifth Circuit rule, as contained in the exceedingly brief decision in this case and in its opinion in *D.J. Investments*, is a clear departure from this Court's due process decisions and from our earliest notions of due process. Litigants under our system do not win by merely alleging and offering evidence when there is a conflict in the evidence. The evidence must be weighed. A burden of persuasion must

be applied. Where the issue is *in personam* jurisdiction, the considerations provided by this Court must be applied in deciding the substantive Constitutional issue. It is to be decided as a preliminary matter, and need not await the conclusion of a full trial, which is the reason for Rule 12(b)(2).

This Court's holdings make it clear that an out of state defendant cannot be haled into court to defend an action unless minimum contacts justify this, whereas the Court of Appeals' holding is that an out of state defendant cannot escape the jurisdiction of any forum if the forum resident makes allegations of fraud and files affidavits supporting plaintiff's version of the matter. Defendant's evidence is not to be credited. This is clearly not the law. Unless this Honorable Court concludes that the trial court should dismiss respondent's action – because even crediting plaintiff's allegations, there is no showing of minimum contacts – the matter should be remanded for a full consideration of the issue of *in personam* jurisdiction applying a proper standard for determining such questions.

C. A Confusion Of Burden Of Production And Burden Of Persuasion Lead To An Irrebuttable Presumption That Defendant Purposefully Availed Itself Of The Laws Of The Forum, Contrary To The Facts

One may contract specifically that any dispute arising out of a contract will be adjudicated in the courts of a particular place. *M/S Bremen & Unterweser Reederei v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972) (*"M/S Bremen"*). In this case, petitioner made it an express condition of

extending any loan to respondent that any dispute under any contract which they might enter into would be adjudicated in the courts of California. This is relevant in two respects:

(1) One can hardly imagine a situation in which one could be less described as availing oneself of the laws of Texas under the holdings of this Court in *Hansen v. Denckla*, 357 U.S. 235 (1958) (*"Hansen"*), *World-Wide Volkswagen v. Woodson*, 444 U.S. 286 (1980) (*"World-Wide Volkswagen"*), *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408 (1984) (*"Helicopteros"*), and *Asahi*. Petitioner was refusing to enter into any contract if respondent continued to insist on Texas as the forum.

(2) Petitioner having remained insistent upon the choice of law and forum clause, under the Fifth Circuit rule, a mere allegation of fraud in the complaint and affidavits supporting respondent's version of the facts lead to an automatic determination that petitioner is subject to the *in personam* jurisdiction of the forum, with any evidence by petitioner to the contrary disregarded. Thus, had a contract been entered into which incorporated petitioner's forum clause, evidence of this fact, which could be dispositive under *M/S Bremen*, would never be considered.

The Fifth Circuit rule, operating as an irrebuttable presumption, forecloses dispositive evidence from the petitioner. This is an elementary denial of due process, *Cleveland Board of Education v. La Fleur*, 414 U.S. 632 (1974).

D. The Importance Of Resolution Of The Issue Presented In This Petition

The importance of resolution of the conflict between the Second and Ninth Circuits, on the one hand, and, on the other hand, the Fifth Circuit with regard to the burden of proof required in deciding a Rule 12(b)(2) motion is manifest. Firstly, because *in personam* jurisdiction affects every litigation where there is a non-consenting non-resident defendant, many other persons or entities, apart from petitioner, will be affected by this Court's resolution of the issue presented in this petition; Secondly, the determination of whether a court has *in personam* jurisdiction for the same set of facts may have different results depending upon in which Circuit the case is heard; Thirdly, because Rules 12(b)(2) and 43 (e) do not define what burden of proof is required in deciding a Rule 12(b)(2) motion, the Circuit Courts have developed different procedures and have applied different burdens of proof, thus requiring this Court's guidance in order to create a uniform national approach by the federal judiciary; Finally, as demonstrated below, had the Fifth Circuit used the proper standard, it should have found no *in personam* jurisdiction.

2. THE RULE DEVELOPED BY THE FIFTH CIRCUIT COURT OF APPEALS, WHICH APPLIES A *PRIMA FACIE* BURDEN OF PROOF TO ESTABLISH *IN PERSONAM* JURISDICTION, IS IN CONFLICT WITH THE MINIMUM CONTACTS DECISIONS OF THIS COURT FROM *INTERNATIONAL SHOE* TO *ASAHI*

A. Had The Court Below Applied The Standards Of This Court, It Could Not Have Found *In Personam* Jurisdiction Under Contemporary Minimum Contacts Standards

Since 1945 and *International Shoe*, this Court's teaching has been that in order for a defendant situated as the

petitioner to be subject to the *in personam* jurisdiction of the forum, the defendant must have established minimum contacts with the forum whereby the defendant enjoys the privilege of doing business in the forum, making it reasonable to require the defendant to defend the particular suit in the forum, given traditional notions of fair play and substantial justice. The satisfaction of due process depends on the quality and nature of the activity in relation to the fair and orderly administration of the laws in a federal system.

In recent years, this Court has begun to set the outer boundaries of jurisdiction beyond which a forum may not constitutionally go and has established the threshold for assertions of forum jurisdiction. In these decisions, this Court has refused to credit a defendant with "contacts" that are the result of the activity of someone other than the defendant and has required that there be purposeful conduct on the part of the defendant such that it is foreseeable by defendant that it may be sued in the forum state. This Court requires that defendant be on clear notice that by acting in a certain way, defendant could be haled into a court outside its home state. These considerations of predictability require appropriate ties between the defendant, the forum, and the litigation.

Unlike the approach of the district court and Fifth Circuit in this case, the first inquiry is not the interest of the forum or of the plaintiff, but whether defendant purposefully availed itself of the forum's benefits. As in *Hansen*, in the instant case, petitioner's contact with the forum, in which it had no office, conducted no business and in which it had made no solicitation, does not meet this Court's test. As in *Hansen*, while respondent may

have engaged in acts in the forum, petitioner has consummated no transaction there; its acts there have been negligible, and it has very clearly not engaged in the required purposeful behavior. Focusing on this Court's emphasis on the importance of a defendant's expectations, one can hardly imagine a case in which it could be less argued that petitioner had purposefully availed itself of the privilege of conducting activities in the forum or invoked the benefits and protection of its laws. The facts are undisputed that petitioner steadfastly maintained that any contract would include a California choice of law and forum clause.

The Fifth Circuit's rule fails to adopt the teaching of this Court in that the Fifth Circuit has adopted a formulation relating to the sufficiency of relationship of a supposed underlying transaction to an interest of the forum in hearing the case, the very analysis which was rejected in *Hansen*.

Very much like the reasoning of the California court rejected in *Kulko v. California Superior Court*, 436 U.S. 8 (1978) ("*Kulko*"), the Fifth Circuit focuses on the alleged damage to the respondent in suggesting that petitioner has caused an effect in the forum. To the contrary, this Court ruled in *Kulko* that the focus is whether a defendant evinced an intent to obtain or an expectation to receive a benefit from the law of the forum. Because of the rule applied by the Fifth Circuit in this case, the Fifth Circuit does not reach the issue of whether petitioner had any expectation to receive such a benefit from the laws of the forum. It would strain the plain meaning of the English language to suggest that petitioner engaged in anything which could be described, as this Court required in *Kulko*, as an act of clearly purposeful conduct that a reasonable

person, responding to an out of state inquiry, would expect to result in litigating in the court in Texas. As in *Hansen*, where it was the prospective heirs under the will, or in *Kulko*, where it was defendant's children, it is respondent, not petitioner who is invoking the protection of the forum's laws, and the respondent's interest does not establish minimum contacts of the petitioner.

The teaching of this Court in *World-Wide Volkswagen* is similarly instructive in that plaintiff in that case also sought to establish minimum contacts in the forum by an assertion that an action out of the forum by defendant had consequences in the forum. This Court emphasized in *World-Wide Volkswagen* that the minimum contacts formulation of due process rights is a protection for the defendant, insures notions of federalism, and recognizes state sovereignty by assuring that states do not encroach on each other's sovereign interests. Because the reach of process in the federal district court in this case is based on the state's long arm statute, which Texas has interpreted as reaching to the full extent of due process (see this Court's finding in *Helicopteros*, 466 U.S. at 413 fn. 4), these considerations apply. In *World-Wide Volkswagen*, even where the auto accident occurred in the forum, this Court held that the test is not the nexus between the litigation and the forum, rather that due process requires that potential defendants be able "to structure their primary conduct with some minimum assurance as to where their conduct will and will not render them liable to suit." *World-Wide Volkswagen*, 444 U.S. at 297.

Similarly, petitioner's contacts with the forum are surely less than those found insufficient in *Helicopteros* and can scarcely be analogized to the contact in *McGee v.*

International Life Insurance Co., 355 U.S. 220 (1957) ("*McGee*"), where it was defendant who solicited a contract and in fact a contract was consummated between the parties, which this Court found to be a "contract with substantial connection" with the forum. In *Hansen*, this court clearly reasserted its position on "territorial limitations" through minimum contracts, citing *McGee*. *Hansen*, 357 U.S. at 251.

A critical factor in analyzing minimum contacts, relevant to this case, is found in *World-Wide Volkswagen*. The Court has taken an important step in establishing some predictability and consistency in applying the minimum contacts standard, presumably so that the standard does not become, as concerned Justice Black at the time of *International Shoe*, a subjective test limited only by unpredictable notions of fairness. Of late, this Court has been emphasizing that in such activities as negotiating a forum clause, such as in *M/S Bremen* or in the present case, a defendant must be able to make reasonable business decisions. Moving from such concepts as presence, consent, and domicile to the more general standard of due process in the area of doing business requires a "degree of predictability" in structuring one's primary conduct. *World-Wide Volkswagen*, 444 U.S. at 297. Thus, it was necessary in that case that defendants, even having purposefully chosen to be part of a national and international network of marketing and servicing autos, must have some contacts, ties or relations with the forum before the court moved to a consideration of the less predictable balancing of interests which might be handled by principles of choice of law or *forum non conveniens*.

Finally, *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985) ("*Burger King*"), which was decided after the Fifth Circuit's opinion in *D.J. Investments*, seems to set any remaining questions to rest. In tort actions, contacts are often fortuitous and the "foreseeability of being haled into court" difficult to assess. Foreseeability is obviously easier to find in contract actions. Defendant knows that it is dealing with plaintiff, and when a contract has provisions relating to the forum, as in the case of the *Burger King* franchise agreement, there is a "substantial connection" with the forum sufficient to anticipate suit in the forum on a claim arising out of the contract. Even where there was a contract in *Burger King*, which there is not in our case, in holding that the contractual relationship had substantial connection with Florida, this Court pointed to specific provisions adopted by the parties as to notice, payments and choice of law. In stark contrast, in our case, petitioner refused to enter into a contract unless it was clear that in the event of litigation the forum would be in California.

As the Court said in *Burger King*, while analysis of choice of law is not the same as analysis of jurisdiction, a forum clause is a factor in jurisdiction analysis. Contrast our case where disagreement over the forum clause was a point of contention, where no contract was consummated, where respondent solicited petitioner's participation and where there were no prior dealings between the parties.

The judicial system's interest in obtaining the most efficient resolution of controversies and the shared interest of states in furthering fundamental substantive social policies (considerations recognized in *World-Wide Volkswagen* and reiterated in *Burger King*) will be best served

by restraining the aggressive Fifth Circuit rule for deciding these cases which avoids this Court's standards by adopting a burden of persuasion as to *in personam* jurisdiction which result in the issue being resolved in favor of plaintiffs on a *prima facie* showing.

These federalism concerns are a part of this Court's assessment of fairness, but in the case of the Fifth Circuit's rule, it is clear that petitioner is being haled into court without minimum contacts, that is to say without a finding of the threshold question, thus making conditions for petitioner "gravely difficult and inconvenient" and putting it at a "severe disadvantage", contrary to this Court's holding in *Burger King*.

CONCLUSION

The Fifth Circuit Court of Appeals' decision has deeply eroded one of the most fundamental principles articulated by this Honorable Court: that a state cannot exercise *in personam* jurisdiction over a non-consenting non-resident defendant without comporting with the dictates of the Due Process Clause of the Fourteenth Amendment. If left standing, the decision will permit courts within the Fifth Judicial Circuit to exercise extra-territorial jurisdiction over countless residents of other states and countries, contrary to due process of law.

For the foregoing reasons, Champion Mortgage Company respectfully requests that the Court grant this Petition for Writ of Certiorari.

LAW OFFICES OF PETER D. LEPISCOPO
KEVIN J. MCINERNEY
PETER D. LEPISCOPO
Counsel for Petitioner

On The Brief:
HOWARD H. ORENSTEIN

DATED: October 26, 1989

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

NO. 89-1109
Summary Calendar

THE LAKE TRAVIS ISLAND, LTD.,
Plaintiff-Appellee,

versus

CHAMPION MORTGAGE COMPANY,
Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas
(A-87-CA-385)

(June 28,1989)

Before REAVLEY, JONES, and DUHE, Circuit Judges.*

PER CURIAM:

The judgment of the district court is affirmed pursuant to Fifth Circuit Local Rule 47.6, with two additional points.

1. To the extent Champion implies the district court should have ordered a hearing on personal jurisdiction,

---

*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to the Rule, the court has determined that this opinion should not be published.

this was plainly unnecessary to the usual procedure for deciding the issue (see Fed.R.Civ.Proc. 43(e); *Thompson v. Chrysler Motors Corp.*, 755 F.2d 1162, 1165 (5th Cir. 1985)), and Champion never requested a hearing according to the Local Rules of the Western District of Texas. It waived this right.

2. *Stuart v. Spademan*, 772 F.2d 1185 (5th Cir. 1985), cited by Champion, is distinguishable. That case involved a pure breach of contract claim, and the only connections between the defendant and Texas were phone calls, isolated shipment of goods, and payments to Texas bank accounts. This case, by contrast, more closely resembles *D.J. Investments v. Metzeler Motorcycle Tire*, 754 F.2d 542 (5th Cir. 1985), in which fraud was alleged as well as breach of contract for the sale of a Texas tire dealership. The fraud was allegedly intended to and did cause damage in Texas, as Champion's conduct did here.

AFFIRMED.

Costs on appeal are taxed against the appellant.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

LAKE TRAVIS ISLAND, LTD.	)	
VS.	)	*CIVIL NO. A-87-CA-385*
CHAMPION MORTGAGE COMPANY	)	

ORDER

Before the Court is Defendant's Motion to Dismiss or in the Alternative Transfer Venue. The Court, having considered the Motion, as well as the Plaintiff's Response, in addition to all of the pleadings on file in this cause, is of the opinion that the motion is not meritorious and should be denied.

I. *BACKGROUND*

Defendant is a California corporation that provides "Forward-End Loan Permanent Take-Out Commitments" to real estate developers. In the Fall of 1986, Plaintiff contacted Defendant and inquired about the possibility of obtaining financing from Defendant for a Development in Texas. The defendant sent Plaintiff an application for financing. The parties exchanged numerous letters and proposals. During the early stages of the negotiations Plaintiff sent Defendant $33,000, $30,000 as a good faith deposit on the commitment fee, and $3,000 as a deposit on site inspection fees. The talks eventually broke down.

and the financing was not provided by defendant. Plaintiff then requested the return of the $33,000 in deposits. Defendant has failed to return the funds, and Plaintiff therefore filed this action. The suit seeks recovery on three theories: violations of the Texas Deceptive Trade Practices-Consumer Protection Act (DPTA); breach of contract; and common law fraud.

Defendant's Motion requests that the Court dismiss the action because the Court lacks jurisdiction over the Defendant. The Motion also asks the Court to dismiss the DPTA claims because the Plaintiff is not a consumer under the Act. Finally, the Motion requests that in the alternative, the Court transfer this case to the United States District Court for the Southern District of California.

II. *DISCUSSION*

A. *Jurisdiction*

This Court, sitting in diversity, may exercise jurisdiction over a party consistent with the terms of the Texas "long arm" statute, TEX. CIV. PRAC. & REM. CODE ANN. SEC 17.041 *et seq.* (Vernon 1986). As all the parties note, the Texas long-arm statute reaches to the full extent possible under the Due Process Clause of the Fourteenth Amendment. *Hall v. Helicopteros Nacionales de Columbia, S.A.*, 638 S.W.2d 870 (Tex. 1984), *rev'd on other grounds*, 466 U.S. 408 (1984). The question that is presented in this case, therefore, is whether the exercise of long-arm jurisdiction over the Defendant offends "traditional conception(s) of fairplay [*sic*] and substantial justice" embodied in the Fourteenth Amendment Due Process Clause. *See*

International Shoe Co. v. Washington, 326 U.S. 310, 320 (1945).

"The Due Process Clause protects an individual's liberty interest in not being subject to the binding judgments of a forum with which he has established no meaningful 'contacts, ties, or relations.'" *Burger King Corp. v. Rudzewcz*, 471 U.S. 462, 471-72 (1985) *(citing International Shoe)*. In *Burger King* the Supreme court, in reviewing its earlier personal jurisdiction cases, stated that

> Where a forum seeks to assert specific jurisdiction over an out-of-state defendant who has not consented to suit there, (the Due Process Clause) is satisfied if the Defendant has 'purposefully directed' his activities at residents of the forum, *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774 (1984), and the litigation results from alleged injuries that 'arise out of or relate to' those activities, *Helicopteros Nacionales de Colombia, S.A.*, 466 U.S. 408, 414 (1984).

Id. at 472. With specific reference to interstate contractual obligations, the court held that "parties who 'reach out beyond one state and create continuing relationships and obligations with citizens of another state' are subject to regulation and sanctions in the other state for the consequences of their activities." *Id. (citing Travelers Health Ass'n v. Virginia*, 339 U.S. 643, 647 (1950)). In a situation such as the present case, the touchstone for exercising jurisdiction is whether "the defendant's conduct and connection with the forum state are such that he should reasonably anticipate being haled into court there." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 295 (1980). In determining whether the defendant should have reasonably anticipated being sued in the forum

state, "it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws," *Hansen v. Denckla*, 357 U.S. 235, 253 (1958).

The "purposeful availment" requirement is intended to prevent a defendant from being haled into court in a distant forum as the result of some "fortuitous" or "random" contacts, *Keeton* 465 U.S. at 774, or by "unilateral activity of another party or third person," *Helicopteros*, 466 U.S. at 417. Where the defendant has created "continuing obligations" between himself and residents of the forum state, he has been found to have "availed" himself of the privilege of doing business in that state. *Travelers*, 339 U.S. at 648. Moreover, one need not physically enter the state to avail oneself of the privilege of doing business there, because "it is an inescapable fact of modern commercial life that a substantial amount of business is transacted solely by mail and wire communications across state lines, thus obviating the need for physical presence within a state in which business is conducted." *Burger King*, 471 U.S. at 476. In the context of contractual disputes, the Supreme Court in *Burger King* instructed as follows:

> If the question is whether an individual's contract with an out-of-state party *alone* can automatically establish sufficient minimum contacts in the other party's home forum, we believe the answer clearly is that it cannot. The Court long ago rejected the notion that personal jurisdiction might turn on 'mechanical' tests, *International Shoe Co. v. Washington*, 326 U.S., at 319, 66 S.Ct., at 159, or on 'conceptualistic. . . .theories of the

> place of contracting or of performance,' *Hoopeston Canning Co. v. Cullen, supra,* 318 U.S. at 316, 63 S. Ct. at 604. Instead, we have emphasized the need for a 'highly realistic' approach that recognizes that a 'contract' is ordinarily but an intermediate step serving to tie up prior business negotiations with future consequences which themselves are the real object of the business transaction.' *Id.* at 316-317, 63 S. Ct. at 604-605. It is these factors – prior negotiations and contemplated future consequences, along with the terms of the contract and the parties' actual course of dealing – that must be evaluated in determining whether the defendant purposefully established minimum contact within the forum.

471 U.S. at 478-79.

Applying these principles to the instant case, the Court is of the opinion that it has jurisdiction over the Defendant. As stated previously, the parties engaged in negotiations for a number of months, through the mail and over the telephone. The Defendant anticipated that if the financing was approved, it would have a continuing relationship with homeowners in the Plaintiff's development by providing takeout financing to individual buyers. The contract would have created a debtor/creditor relationship between Defendant and homeowners that would have lasted up to 30 years. The fact that the agreement was not executed does not diminish the fact that the Defendant anticipated substantial future consequences from its dealings with the Plaintiff. Indeed, the Defendant argues that it was ready and willing to provide the financing, and that the deal fell through only because Plaintiff was unwilling to accept it on Defendant's terms.

Defendant argues that the fact that its standard contract contained a choice of law and forum clause providing for litigation in California shows that it did not anticipate being haled into court in Texas. The court is of the view that the clause shows just the opposite. The fact that Defendant attempted to negotiate for litigation *only* in California indicates that it anticipated the possibility of litigation elsewhere. It is significant to note that Plaintiff refused to include the choice of law and forum clause in its counter-proposals, and never agreed to the clause.

Therefore, the Court is of the opinion that the Defendant reasonably anticipated being haled into court in Texas for disputes arising out of its dealings with Plaintiff. It has thus been demonstrated that the Defendant purposefully established minimum contacts with this forum. The Defendant has presented no evidence of "other factors" which would make the exercise of jurisdiction in this case so unfair as to violate notions of fair play and substantial justice. *See Burger King*, 471 U.S. at 476-78. The court therefore concludes that the exercise of jurisdiction over this Defendant in this case comports with the requirements of the Due Process Clause of the Fourteenth Amendment. Accordingly, the Court will deny Defendant's Motion to Dismiss on jurisdictional grounds.

B. *DPTA Claims*

As noted earlier, the Defendant also argues that Plaintiff's claims that are based upon the DPTA should be dismissed because the Plaintiff is not a consumer as that

term is defined in the Act. The term is defined in the Act as follows:

> 'Consumer' means an individual, partnership, corporation, this state, or a subdivision or agency of this state who seeks or acquires by purchase or lease, any goods or services, except that the term does not include a business consumer that has assets of $25 million or more, or that is owned or controlled by a corporation or entity with assets of $25 million or more.

TEX. BUS. & COMM. CODE ANN. section 17.45(4) (Vernon Supp. 1987). Defendant argues that Plaintiff is a business with assets in excess of $25 million, or that the general partner that controls Plaintiff is a business with assets in excess of $25 million, and therefore Plaintiff is not a consumer under the DPTA.

The Plaintiff has filed an affidavit denying that it or its general partner have ever maintained to Defendant that they owned assets in excess of $25 million. The affidavit further states that neither business has ever had assets in excess of $25 million since the time that the negotiations with defendant commenced.

Rule 12(b) states that if a motion is made under the terms of Rule 12(b)(6), and matters outside the pleading are presented in support of or response to the motion, the court is to treat the motion as a motion for summary judgment under Rule 56. FED.R. CIV. P. 12(b). The parties have each submitted affidavits on this portion of the Motion to dismiss, and the Court must therefore treat the Motion as a motion for summary judgment. A motion for summary judgment may only be granted when there are no genuine issues of material fact for trial. FED.R.CIV.P.

56(c). It is clear that this is not the case on the question of whether the Plaintiff was a consumer under DPTA – the affidavits of the parties contain contradictory testimony. Thus, the Court must deny the Motion.

Defendant also argues that the Plaintiff is not eligible for recovery under DPTA because Plaintiff is a merchant, and thus excluded from the act. As Plaintiff points out, the cases relied upon by Defendant for this argument are not on point. *Ratcliff v. Trenholm*, 596 S.W.2d 645 (Tex.Civ.App. – Tyler 1980, no writ) dealt with the predecessor to the present DPTA, and is not applicable to actions brought under the current act. *Big H. Auto Auction, Inc. v. Saenz Motors*, 665 S.W.2d 756 (Tex. 1984). *South Texas Irrigation Systems, Inc. v. Lockwood Corp.*, 489 F. Supp. 256 (W.D. Tex. 1980) has been expressly repudiated by the Texas Supreme Court. *Big H Auto*, 665 S.W.2d at 759. Thus, the Defendant has not presented the Court with any authority for dismissal on the basis that Plaintiff is a merchant, not a consumer.[1]

C. *Motion to Transfer*

The Defendant argues that if the Court does not dismiss the action for lack of jurisdiction, it should transfer the case to the Southern District of California. The Defendant does not make any reference to 28 U.S.C. section 1404(a), or the factors for transfer set out in that

---

[1] This denial of Defendant's Motion does not by any means close the door on the issue of whether or not the Plaintiff is a consumer under the Act. If the Defendant, after discovery and further research, wishes to interpose an additional motion on this point, the Court will certainly entertain it.

statute. Without any evidence on this point, the court cannot transfer the case, particularly when it is apparent that venue is not improper in this Court. *See* 28 U.S.C. section 1391(a).

IV. *CONCLUSION*

The Defendant has failed to establish that the Plaintiff is not a consumer under the DPTA or that this action should be transferred to California. Moreover, the Plaintiff has demonstrated that the Defendant has sufficient contact with the State of Texas to merit this Court [*sic*] jurisdiction over the Defendant.

ACCORDINGLY, IT IS ORDERED that Defendant's Motion to Dismiss or in the Alternative Transfer Venue is, in all things, DENIED.

SIGNED and ENTERED this *23rd* day of September, 1987.

JAMES R. NOWLIN
UNITED STATES DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS,
AUSTIN DIVISION

THE LAKE TRAVIS ISLAND, LTD.,
Plaintiff,

CIVIL ACTION NO:
A 87 CA 385

VS.

CHAMPION MORTGAGE COMPANY,
Defendant.

AFFIDAVIT OF VINCENT L. CONIGLIO,
IN SUPPORT OF DEFENDANT-PETITIONER
CHAMPION MORTGAGE COMPANY
MOTION FOR REMOVAL

I, VINCENT L. CONIGLIO, say:

I.

I am the president of the petitioning Defendant Champion Mortgage Company, a Corporation duly organized and existing under the laws of the State of California, with its principal place of business located at San Diego, California. Champion Mortgage Company has no offices, agents or staff in Texas.

II.

Champion Mortgage Company is not licensed to do business in Texas, and did not do business in Texas during the times pertinent herein. The contract which is the basis of this dispute was executed in San Diego, California.

III.

As President, I am authorized to make this Affidavit on its behalf.

IV.

I have read and know the contents of the Petition to Remove the Civil Action, to which this Affidavit is attached.

V.

Champion Mortgage Company ("CMC") is a California corporation, with its principal place of business in San Diego, California. CMC provides "Forward-End Loan Permanent Take-Out Commitments" ("Commitment") to real estate developers and construction lending institutions. A take-out commitment is a long term mortgage vehicle used to provide debt financing to purchasers of individual residential units.

VI.

CMC is contacted by developers or brokers who request CMC to send an application package to them. The developer completes the application and submits financial and market data along with a good faith deposit and site inspection fee to CMC. CMC evaluates the package, completes a site inspection and then issues an offer to commit if it considers the development sound. CMC earns the commitment fee when it issues the offer for a commitment.

VII.

If CMC elects to issue a commitment to the developer, the developer delivers to CMC at its San Diego office, the loan applications and documents from potential purchasers of the developer's units. CMC then underwrites and processes the individual loans in San Diego. Ultimately, the loans are funded in San Diego. Escrow is opened in the county of the development and CMC causes the title documents to be recorded in the appropriate county, as an accommodation to the purchaser.

VIII.

On or about August-September 1986, CMC was contacted by a commercial mortgage broker who identified himself as Greg-Preston, ("PRESTON"), Southland Mortgage Company, of Irving, Texas. Preston contacted CMC on behalf of Lake Travis Island, Ltd., ("LAKE TRAVIS") and requested that CMC send to him an application from CMC for a commitment. Subsequent to Preston's call to CMC, Glenn Reschke, Senior Vice President of The Prime Group, Inc., ("PRIME") contacted CMC on behalf of Lake Travis. Prime is the General Partner of Lake Travis. Reschke also sought an application from CMC for a commitment on behalf of Lake Travis. At no time did CMC solicit the business of Lake Travis. Rather, it was the agents of Lake Travis who solicited CMC. Said agents represented to CMC that Prime and also that Lake Travis each had assets in excess of $25 Million. Based on said asset strength, CMC conducted due diligence and issued an application.

IX.

On or about June 2, 1986, CMC mailed an application to Reschke in response to his solicitation. The application was mailed by CMC using its forms. Another application was sent to Reschke on or about September 2, 1986, using CMC's forms. Both applications contained a choice of forum and choice of law clause which identified San Diego, California as the place where the application is entered into. The application also stated that any dispute arising under the application shall be adjudicated in the appropriate State or Federal Court in San Diego, California. The application also states that the laws of California shall control disputes arising under the application.

X.

Reschke responded to CMC's application on or about September 29, 1986 by sending to CMC an application for a commitment using Prime's forms. The Prime application was essentially the same as the format used by CMC. The Prime application contained modifications to the terms offered by CMC's earlier applications and omitted the choice of forum and choice of law clause. The Prime application included Schedules "A" and "B" which were wholly reproduced from CMC applications. The Prime application requested CMC to prepare and forward new applications for Reschke's execution if CMC agreed to Prime's terms and conditions. Thus, it was Prime's intent to execute an application using CMC's forms, which would include said choice of law and forum clauses.

XI.

On or about October 7, 1986 CMC mailed to Reschke another application, using CMC's forms. The choice of law and forum clause were included in the application. On or about October 14, 1986, Reschke sent to CMC correspondence in which Prime objected to certain loan provisions of CMC's application. Prime suggested additional terms to CMC's application and identified issues it requested to be further defined and clarified. Prime did not object or identify for definition and/or clarification the choice clauses.

XII.

Telephonic negotiations continued between Reschke and CMC after Prime's letter of October 14, 1986. As a result of those negotiations, CMC issued an offer of a commitment to Lake Travis, on or about October 23, 1986. Prime and Lake Travis accepted CMC's choice clauses through Reschke. The only unresolved issue as of that time was the form of the commitments for Lake Travis.

XIII.

CMC has never done business in Texas. During the course of negotiations with Lake Travis, CMC structured its activities to avoid the benefits and protection of Texas jurisdiction. As such, CMC included a choice of forum clause, which identified San Diego, California, as the forum to adjudicate disputes arising under the application and offer to commitment. CMC also include a choice of law clause which identified the laws of California as

the law governing disputes arising from the application and offer to commit. During the negotiations between CMC and Lake Travis, Lake Travis accept CMC's choice clauses.

XIV.

CMC's sole contact with Texas results from the isolated negotiations with Lake Travis. Those negotiations included a site inspection of the development which was conducted by a representative of CMC.

XV.

CMC owns no property nor has any property interest in Texas. CMC has never been involved in litigation in Texas prior to this action. Except for the site inspection of the development, CMC has never been physically present in Texas. CMC has no agents, brokers, or sales representatives in Texas.

I am informed and believe that the matters stated herein are true and correct and on that ground I allege that the matters stated therein are true.

Executed on July 6, 1987 at San Diego, California.

I declare under penalty of perjury under the laws of the state of California and Texas that the foregoing is true and correct.

CHAMPION MORTGAGE COMPANY

_____

Vincent L. Coniglio
President

Subscribed and sworn to before me this 6th day of July, 1987.

Notary Public for California
My commission expires 1991

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

THE LAKE TRAVIS ISLAND, LTD., Plaintiff,	)	CIVIL ACTION NO. A-87-CA-385
v.	)	
CHAMPION MORTGAGE COMPANY, INC., Defendant.	)	

AFFIDAVIT

BEFORE ME, the undersigned authority, personally appeared Glenn D. Reschke, who being first duly sworn, stated as follows:

"My name is Glenn D. Reschke. I am over eighteen years of age, am of sound mind, have never been convicted of a felony, have personal knowledge of every statement herein made, and am fully competent and authorized to testify to the matters stated herein. I am senior vice president of the Prime Group, Inc. [*sic*] I make this affidavit in support of The Lake Travis Island, Ltd.'s response to Champion Mortgage Company's motion to dismiss or alternatively to transfer in civil action No. A-87-CA-385. I have personal knowledge of the negotiations for a permanent loan commitment at issue in this case, and the surrounding transaction and events.

I initially talked to David Gugerty of Champion Mortgage Company ("CMC") on or about May 15, 1986 in the hope of obtaining an end loan commitment for The Lake Travis Island, Ltd. ("Lake Travis"). On or about

September 3, 1986, I received an application for a loan commitment from CMC which was the result of an earlier telephone conversation with CMC personnel in which I described a general outline of requirements for an end loan commitment. On or about September 9, 1986, Lake Travis wrote to CMC requesting a commitment under certain terms and conditions. Lake Travis forwarded a check in the amount of $33,000.00; $30,000.00 was forwarded as a good faith deposit on the commitment fee and $3,000.00 was forwarded as a good faith deposit on site inspection fees. The money was forwarded at the insistence of CMC and on the express condition, as stated in the letter that, "(i)t is agreed that Champion will in accepting such funds have 30 days from the date of this letter in which to secure a commitment which is consistent with the terms and conditions contained herein or such other terms and conditions that may be acceptable to Applicant. Unless such satisfactory commitment as set forth above is received by the Applicant within 30 days of the date of this letter Champion agrees to refund any and all funds paid to Champion including the Good Faith Deposit and Site Inspection Fee less any actual costs incurred by Champion to deduct a site inspection. In no case shall such inspection cost exceed $3,000.00."

"If such commitment had been forthcoming, CMC could reasonably have been involved in a continuing relationship of approximately thirty years duration with individual buyers of condominium units at The Lake Travis project, which is located in Travis County, Texas. I have also reviewed documents and brochures provided by CMC in solicitation of Lake Travis' business which outline numerous other projects that CMC, by its own

admission, has permanently financed in Texas. Additionally, I discussed with CMC personnel, and they were amenable to the idea of having CMC provide an on site loan representative or agent to discuss loans with buyers at Lake Travis project in the event a satisfactory commitment was forthcoming. Both Lake Travis and CMC personnel expected that their relationship within the state of Texas would be substantial and continuing. Communications and brochures I have received represent that CMC is already involved in financing real estate projects in Texas. On one occasion, I have knowledge that CMC personnel traveled to Texas in order in inspect the Lake Travis project.

At no time during these negotiations did I make any representations to CMC personnel that Lake Travis or Prime Investment, Inc. had assets in excess of $25 million. In fact, neither Lake Travis nor Prime Investments, Inc. have $25 million in assets nor has either entity approached the $25 million mark at any time since the initial contact with CMC.

"At no time did CMC forward a conforming commitment. Therefore, there was no contractual understanding between CMC and Lake Travis. Additionally, Lake Travis never agreed to any choice of forum or choice of law clause. To the contrary, the offer and counter offers made by Lake Travis to CMC specifically excluded any choice of forum or choice of law clause.

"Lake Travis has made repeated demands upon CMC to return the good faith deposits initially sent on or about September 9, 1986. After refusing to respond to a number of telephone calls requesting return of these monies,

CMC wrote to Lake Travis on or about December 9, 1986 refusing return of these good faith deposits. Up to the date of this affidavit, CMC has continued to refuse to refund these payments. Because of this refusal, the Prime Group, Inc., on behalf of Lake Travis has been forced to employ McGinnis, Lochridge & Kilgore as its attorneys to secure the refund of this money."

Further affiant saith not.

Glenn D. Reschke

Supreme Court, U.S.
FILED
NOV 29 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-702

In The

Supreme Court of the United States

October Term, 1989

CHAMPION MORTGAGE COMPANY,

Petitioner,

v.

LAKE TRAVIS ISLAND, LTD.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

(1) Whether petitioner preserved its present procedural complaint in the courts below.

(2) Whether a Rule 12(b)(2) motion to dismiss for lack of *in personam* jurisdiction submitted on affidavits may properly be decided by the district court by applying a *prima facie* burden of proof.

LIST OF PARTIES

The parties to the proceedings below were the petitioner Champion Mortgage Company and respondent The Lake Travis Island, Ltd. The Lake Travis Island, Ltd. has no affiliates, parents or subsidiaries required to be listed by Rule 28.1.

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RULES INVOLVED

In addition to the constitutional and statutory provisions and rules cited by petitioner, the following local rule of the United States District Court for the Western District of Texas is pertinent to decision of this case:

> Rule 300-5(h) **Oral Hearings**. A movant or respondent may specifically request an oral hearing, but the allowance of an oral hearing shall be within the sole discretion of the judge to whom the motion is assigned.

STATEMENT OF THE CASE

1. COURSE OF PROCEEDINGS AND DISPOSITION BELOW

This action was instituted by Respondent The Lake Travis Island, Ltd. ("Respondent" or "Lake Travis") as Plaintiff in state district court in May, 1987. (R. 165). Petitioner Champion Mortgage Company ("Petitioner" or "Mortgage Company"), as Defendant, removed the cause to federal court on June 23, 1987, and, two weeks later, moved to dismiss on the ground that personal jurisdiction in Texas allegedly was lacking; or alternatively for change of venue. (R. 133, 160). Defendant Mortgage Company submitted with the motion an affidavit attested to only on "information and belief" by its president, Mr. Vincent L. Coniglio. (Mortgage Company's Petition at Appendix C, R. 112, 117). Plaintiff Lake Travis filed a response to the motion that included the affidavit of Mr. Glenn D. Reschke, senior vice president of The Prime Group, Inc., general partner of Plaintiff Lake Travis. (Petition at Appendix D, R. 138, 150).

The federal district court denied Defendant Mortgage Company's motion to dismiss or transfer venue on September 23, 1987. (R. 102-111).

On February 1, 1988, Plaintiff Lake Travis submitted interrogatories and a request for the production of documents to Defendant Mortgage Company. (See R. Vol. 2). After trying unsuccessfully to resolve disputes over responses to the discovery requests, Plaintiff Lake Travis moved to compel the production of certain documents and answers to certain interrogatories. (R. 50). No response to the motion was filed.

In May, 1988, Plaintiff Lake Travis noticed the depositions of three officers of Defendant Mortgage Company, including Mr. Coniglio, to be conducted on June 6, 1988. (R. 33). The witnesses failed to appear. Accordingly, Plaintiff Lake Travis moved for sanctions, including the striking of Defendant Mortgage Company's pleadings and rendition of judgment against it. (R. 33). No response to the motion was filed.

Orders rendered by the magistrate and the federal district court on July 6, August 11, and September 15, 1988, directing compliance with deadlines for discovery and for payment to Plaintiff Lake Travis of $3,215.00 in costs and attorneys' fees for discovery abuse, were ignored by Defendant Mortgage Company. (*See* R. 33 and docket sheet). On September 29, 1988, Plaintiff Lake Travis moved for default judgment because of the continuing failure of Defendant Mortgage Company and its counsel to comply with the court orders. (R. 37). No response to the motion was filed.

On October 31, 1988, the district court rendered an order that recited the lengthy history of delay, discovery abuse, and disregard of the district court's orders by Defendant Mortgage Company and its counsel. The court then concluded,

> The Court is of the opinion that *there is a clear record of delay and contumacious conduct by Defendant and his counsel over a period of at least four months.* . . . Given Defendant's failure to comply with the Court's earlier orders that imposed monetary sanctions, but refrained from the more serious sanctions authorized by Rule 37(b)(2)(C), the Court is of the opinion that a lesser sanction will not have the desired result. Plaintiff has certainly been substantially prejudiced in preparing for trial by Defendant's refusal to respond fully to specific interrogatories and requests for production, and by Defendant's failure to produce its president, [Mr. Coniglio,] a loan officer, and a Rule 30(b)(6) witness for deposition. There is absolutely no indication that Defendant's failure to comply results from honest confusion, sincere misunderstanding of the orders, inability to comply, or nonfrivolous assertion of a constitutional right. Finally, the Court is of the opinion that the neglect is not completely attributable to Defendant's attorney. The interrogatories and requests for production were directed towards the Defendant, and Defendant's officers were noticed for depositions. Surely, Defendant is not the blameless client of a neglectful attorney.

(R. 35-36, emphasis added). Accordingly, the court ordered that Plaintiff Lake Travis' motion for default judgment be granted.

Plaintiff Lake Travis moved for entry of judgment, pursuant to the court's October 31, 1988 order, on

November 15, 1988. (R. 28). No response to the motion was filed. The district court rendered final judgment on December 14, 1988, and awarded to Plaintiff Lake Travis $33,000 in actual damages and $66,000 in additional statutory damages, pursuant to the Texas Deceptive Trade Practices-Consumer Protection Act, plus interest, attorneys' fees, and costs. (R. 2).

Defendant Mortgage Company appealed to the United States Court of Appeals for the Fifth Circuit solely from the district court's decision on its initial motion to dismiss for lack of personal jurisdiction. Defendant Mortgage Company presented the single issue of whether the district court's exercise of jurisdiction comported with the due process clause of the fourteenth amendment to the Constitution. The court of appeals summarily affirmed the decision of the district court in an unpublished opinion. After obtaining leave to file its petition for writ of certiorari in this court late, Defendant Mortgage Company filed its petition on October 26, 1989. Counsel for respondent received this petition on October 28, 1989.

2. STATEMENT OF FACTS

Plaintiff Lake Travis is a Texas limited partnership located in Austin, Travis County, Texas. The general partner of Plaintiff Lake Travis is The Prime Group, Inc., an Illinois corporation authorized to do business in Texas and actually doing business in Austin, Travis County, Texas. (R. 167).

Plaintiff Lake Travis is the owner and developer of a condominium project on Lake Travis in Travis County, Texas. In 1986, Plaintiff Lake Travis was in the market for

a permanent "end loan" commitment. (Petition at Appendix D, R. 150). This type of commitment "is a long term mortgage vehicle used to provide debt financing to purchasers of individual residential units." (Petition at Appendix C, R. 113).

Defendant Mortgage Company is incorporated in the State of California. (R. 167). Defendant Mortgage Company sent brochures and other documents and communications to Plaintiff Lake Travis in Texas soliciting Plaintiff Lake Travis' business. The brochures and other communications also described "numerous other projects" in Texas for which Defendant Mortgage Company was providing permanent financing. (Petition at Appendix D, R. 152).

On or about May 15, 1986, one of Plaintiff Lake Travis' representatives in Austin, Texas, Mr. Reschke, spoke by telephone with a representative of Defendant Mortgage Company in California. (Petition at Appendix D, R. 150). In subsequent telephone communications between representatives of the parties in the two states Plaintiff Lake Travis outlined its requirements for an end loan commitment. Defendant Mortgage Company sent an application for a loan commitment to Plaintiff Lake Travis that was received on September 3, 1986 in Texas. (Petition at Appendix D, R. 150-151).

On September 9, 1986, Plaintiff Lake Travis wrote to Defendant Mortgage Company requesting a commitment under specified terms and conditions. At the insistence of Defendant Mortgage Company, Plaintiff Lake Travis sent with the letter a check in the amount of $33,000.00, that constituted $30,000.00 as a good faith deposit on the proposed commitment fee and $3,000.00 as a good faith

deposit on site inspection fees. The September 9 letter stated:

> It is agreed that [Defendant Mortgage Company] will in accepting such funds have thirty days from the date of this letter in which to secure a commitment which is consistent with the terms and conditions contained herein or such other terms and conditions that may be acceptable to applicant. Unless such satisfactory commitment as set forth above is received by the applicant within thirty days of the date of this letter, *[Defendant Mortgage Company] agrees to refund any and all funds paid to [Defendant Mortgage Company] including the good faith deposit and site inspection fee less any actual costs incurred by [Defendant Mortgage Company] to conduct a site inspection.* In no case shall such inspection costs exceed $3,000.00.

(Petition at Appendix D, R. 151, emphasis added).

Negotiations over the terms of a possible commitment continued after the September 9 letter, with numerous written and telephonic communications back and forth between Texas and California, including offers made by Defendant Mortgage Company and delivered to Plaintiff Lake Travis in Texas. (Petition at Appendix D, R. 151-153; Petition at Appendix C, R. 115-116). During the negotiations, personnel from Defendant Mortgage Company traveled to Texas and inspected Plaintiff Lake Travis' condominium project. (Petition at Appendix D, R. 152; Petition at Appendix C, R. 116).

The proposed commitment delivered by Defendant Mortgage Company to Plaintiff Lake Travis contained California choice of law and choice of forum clauses, but, as acknowledged by Defendant Mortgage Company, the

responses from Plaintiff Lake Travis delineating its requirements for the proposed commitment "omitted the choice of forum and choice of law clause[s]." (Petition at Appendix C, R. 114-115). Plaintiff Lake Travis

> never agreed to any choice of forum or choice of law clause. To the contrary, the offer and counteroffers made by Lake Travis to [Defendant Mortgage Company] specifically excluded any choice of forum or choice of law clause.

(Petition at Appendix D, R. 152-153).

If the parties had agreed upon the terms of a permanent loan commitment, Defendant Mortgage Company

> could reasonably have been involved in a *continuing relationship of approximately thirty years' duration with individual buyers of condominium units* at the Lake Travis project. . . .

(Petition at Appendix D, R. 151). Even in the application phase, Defendant Mortgage Company required "financial and market data" about the Texas project. (Petition at Appendix C, R. 113). Subsequently, Defendant Mortgage Company intended to obtain "loan applications and documents from potential purchasers of developer's units." Additionally, Defendant Mortgage Company intended to open escrow accounts in Travis County and to file the title and mortgage documents in the deed records of Travis County. (Petition at Appendix C, R. 113-114). Furthermore, Defendant Mortgage Company was amenable to the idea of providing "an on site loan representative or agent to discuss loans with buyers at the Lake Travis Project in the event a satisfactory commitment was forthcoming." (Petition at Appendix D, R. 152). In short, "[b]oth Lake Travis and [Defendant Mortgage Company]

personnel expected that their relationship within the State of Texas would be substantial and continuing." (Petition at Appendix D, R. 152).

At no time did Defendant Mortgage Company provide a commitment conforming to Plaintiff Lake Travis' specified requirements, and consequently a financing agreement was not consummated. After repeated demands by Plaintiff Lake Travis for the return of its deposits, Defendant Mortgage Company wrote a letter on December 9, 1986 refusing to return the $33,000.00. (Petition at Appendix D, R. 153). Counsel for Plaintiff again demanded return of the deposits by a letter that also gave notice of a potential claim under the Texas Deceptive Trade Practices-Consumer Protection Act. (R. 170). Defendant Mortgage Company persisted in its refusal to return the $33,000.00, and this suit was filed in Texas on May 15, 1987. (R. 165, 167).

REASONS FOR DENYING THE WRIT

1. PETITIONER HAS FAILED TO PRESERVE THE ERROR COMPLAINED OF FOR REVIEW BY THIS COURT

It is an elementary rule of practice in this Court that in order to secure review of a legal issue through a writ of certiorari, that issue must first be presented to the lower federal courts in all but the most exceptional circumstances. *Youakim v. Miller*, 425 U.S. 231 (1976). This Court has made clear that it will not review questions presented for the first time to the Supreme Court. *Delta Airlines v. August*, 450 U.S. 346, 362 (1981) (question presented in

petition but not in court of appeals is not properly before the Court).

Petitioner frames the question presented here as: "whether . . . a Rule 12(b)(2) motion to dismiss for lack of *in personam* jurisdiction can be decided by applying a *prima facie* burden of proof. . . ." Yet petitioner did not present this question to either the district court or the court of appeals.

In the district court petitioner filed a motion to dismiss for lack of personal jurisdiction under Rule 12(b)(2), Federal Rules of Civil Procedure ("FRCP") (R. 133, 160). Petitioner submitted an affidavit in support of its motion. (R. 112, 117). At no time did petitioner file a request for oral argument or an evidentiary hearing on this motion, even though a party seeking oral argument is required to do so by local rules. (See Western District of Texas Local Rule 300-5(h)). Nor did petitioner complain at any time of the district court's decision, under Rule 43(e), FRCP, to decide this motion on the basis of the affidavits presented.

The record in the court of appeals is equally clear. Petitioner never squarely addressed the procedural issue presented here in its briefs and only cursorily discussed Rule 43(e), FRCP, the standard for ruling upon the motion, or the district court's decision to decide the motion on the basis of affidavits. Indeed petitioner's complaints about the court of appeals' decision in *D. J. Investments v. Metzeler Motorcycle Tire*, 754 F.2d 542 (5th Cir. 1985), appear for the first time in its petition.

Under these circumstances alone, petitioner has waived its right to this Court's review of the question presented.

2. THERE IS NO CONFLICT BETWEEN THE CIRCUITS ON THE QUESTION PRESENTED

A. Petitioner misstates the procedure and standard for deciding a motion to dismiss for lack of personal jurisdiction.

The standard applied by the courts of appeals for deciding a motion to dismiss for lack of personal jurisdiction submitted on affidavits is clear: where the motion is ruled on prior to trial and without a full evidentiary hearing, the plaintiff is only required to make a *prima facie* showing of jurisdiction, but must still prove jurisdiction at trial by a preponderance of the evidence. *Travelers Indem. Co. v. Calvert Fire Ins. Co.*, 798 F.2d 826, 831 (5th Cir. 1986), *modified* 836 F.2d 850 (1988); *accord Data Disc, Inc. v. Systems Technology Associates, Inc.*, 557 F.2d 1280, 1285 n. 2 (9th Cir. 1977); *Marine Midland Bank, N.A. v. Miller*, 664 F.2d 899, 904 (2d Cir. 1981).

Petitioner's argument that the district court was somehow required, in the absence of any request, to hold an evidentiary hearing or mini-trial on the issue of personal jurisdiction is not only at odds with the practice in federal courts, it directly contravenes the mandate of Rule 43(e), FRCP. That rule provides:

> When a motion is based on facts not appearing of record *the court may hear the matter on affidavits presented by the parties.* (emphasis added).

If petitioner is complaining that it was never allowed to present evidence at trial, the matter is easily explained. The district court entered a default judgment against petitioner for repeated contumacious conduct in failing to respond to discovery requests. (R. 35-36). Having refused to participate in the discovery process, petitioner can hardly complain that it was deprived of the opportunity to litigate the jurisdictional question more completely.

B. The procedure applicable to deciding these motions in the Court of Appeals for the Fifth Circuit is not in conflict with the decisions of other courts of appeals.

The procedure for dealing with these motions in the Fifth Circuit is far from anomalous. At least seven courts of appeals apply an identical procedure. *Reuber v. U.S.*, 750 F.2d 1039 (D.C. Cir. 1984); *Cutco Industries v. Naughton*, 806 F.2d 361 (2d Cir. 1986); *American Greetings Corp. v. Cohn*, 839 F.2d 1164 (6th Cir. 1988); *Turnock v. Cope*, 816 F.2d 332 (7th Cir. 1987); *Institutional Food Marketing v. Golden State Strawberries*, 747 F.2d 448 (8th Cir. 1984); *Flynt Distributing Co. v. Harvey*, 734 F.2d 1389 (9th Cir. 1984); *Ten Mile Indus. Park v. Western Plains Service Corp.*, 810 F.2d 1518 (10th Cir. 1987). Indeed, the Fifth Circuit's opinion in *Travelers, supra*, expressly recognizes and adopts the Ninth and Second Circuits' decisions in *Data Disc, supra*, and *Marine Midland, supra*, two cases cited by petitioner in support of an alleged conflict between the Fifth, Second and Ninth Circuits. Far from representing a conflict between circuit courts of appeals, this procedure represents uniformity of decision among federal appellate courts.

3. THE PROCEDURE EMPLOYED BY THE COURTS OF APPEALS COMPLIES WITH CONSTITUTIONAL DUE PROCESS REQUIREMENTS

In seeking to raise a constitutional issue, petitioner has misstated the burden of proof applicable to a determination of personal jurisdiction. Petitioner exhorts this Court to restrain

> the aggressive Fifth Circuit rule for deciding these cases which avoids this Court's standards by adopting a burden of persuasion (sic) as to *in personam* jurisdiction which results in the issue being resolved in favor of plaintiffs on a *prima facie* showing. (Petition 22).

However, that is not the way the Fifth Circuit or any other circuit deals with the issue of personal jurisdiction.

The courts of appeals uniformly hold that "a plaintiff must have proved by the end of trial the jurisdictional facts by a preponderance of the evidence." *Forsythe v. Overmeyer*, 576 F.2d 779, 781 (9th Cir.), *cert. denied*, 439 U.S. 864 (1978). The Second Circuit succinctly explained the rule applied throughout the courts of appeals:

> If the court chooses not to conduct a full-blown evidentiary hearing on the motion, the plaintiff need make only a prima facie showing of jurisdiction through its own affidavits and supporting materials. Eventually, of course, the plaintiff must establish jurisdiction by a preponderance of the evidence, either at a pretrial evidentiary hearing or at trial. But until such a hearing is held, a prima facie showing suffices, notwithstanding any controverting presentation by the moving party, to defeat the motion.

Marine Midland Bank, N.A. v. Miller, 664 F.2d 899 (2d Cir. 1981); *accord Travelers Indem. Co. v. Calvert Fire Ins. Co.*, 798 F.2d 826, 831 (5th Cir. 1986), *modified* 836 F.2d 850 (1988).

Petitioner has confused the burden of proof placed upon a plaintiff in a pretrial motion to dismiss supported by affidavits with the ultimate burden of proof a plaintiff bears at trial. Where the court is asked to decide a pretrial motion to dismiss on the basis of affidavits, a plaintiff need only make a *prima facie* showing of jurisdiction, but at trial a plaintiff must prove the existence of personal jurisdiction by a preponderance of the evidence.

No other rule makes sense. As plainly stated by the Court of Appeals for the Ninth Circuit:

> If the court determines that it will receive only affidavits or affidavits plus discovery materials, these very limitations dictate that a plaintiff must make only a prima facie showing of jurisdictional facts through the submitted materials in order to avoid a defendant's motion to dismiss. Any greater burden – such as proof by a preponderance of the evidence – would permit a defendant to obtain a dismissal simply by controverting the facts established by a plaintiff through his own affidavits and supporting materials. Thus a plaintiff could not meet a burden of proof requiring a preponderance of the evidence without going beyond the written materials. Accordingly, if a plaintiff's proof is limited to written materials, it is necessary only for these materials to demonstrate facts which support a finding of jurisdiction in order to avoid a motion to dismiss.

Data Disc, Inc. v. Systems Tech. Assoc., Inc., 557 F.2d 1280 (9th Cir. 1977) (footnotes and citations omitted).

CONCLUSION

Petitioner has waived any claim that the procedure used by the district court to decide its motion to dismiss was in error. The district court's procedure is constitutionally sound, follows the letter of the Federal Rules of Civil Procedure and conforms with the decisions of all courts of appeals addressing the issue.

For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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Supreme Court, U.S.
FILED
DEC 29 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-702

In The

Supreme Court of the United States

October Term, 1989

CHAMPION MORTGAGE COMPANY, A California Corporation,

Petitioner,

v.

LAKE TRAVIS ISLAND, LTD.,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITIONER'S REPLY BRIEF

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REPLY TO BRIEF IN OPPOSITION

1. PETITIONER HAS PRESERVED THE ERROR COMPLAINED OF IN ITS PETITION IN ALL FEDERAL COURTS BELOW: COULD THE STATE OF TEXAS CONSTITUTIONALLY EXERCISE *IN PERSONAM* JURISDICTION OVER PETITIONER

Ordinarily, this Court does not decide questions not raised or resolved in the lower federal courts, *California v. Taylor*, 353 U.S. 553, 557 n. 2 (1957); and it is only in exceptional cases coming to this Court from federal courts below that questions *not pressed* or *passed upon* below are reviewed. *Duignan v. United States*, 274 U.S. 195, 200 (1927) (emphasis added). However, this rule is not inflexible. *Boynton v. Virginia*, 364 U.S. 454, 457 (1960).

In its Brief In Opposition, Respondent relies on *Youakim v. Miller*, 425 U.S. 231 (1976) ("*Youakim*") to support Respondent's proposition that Petitioner has not preserved the error complained of in the petition. (Brief In Opposition at 8). However, a correct reading of *Youakim* proves to the contrary.

In *Youakim*, the appellants filed a complaint in the United States District Court for the Northern District of Illinois, praying for injunctive relief. In their complaint, appellants relied solely upon the Equal Protection Clause for their constitutional challenge to an Illinois statute. However, in appellants' jurisdictional statement to this Court on appeal, appellants challenged the Illinois statute on the Equal Protection Clause and, for the first time, on the Supremacy Clause. Although the *Youakim* Court found that appellants did not raise the Supremacy Clause

challenge in the district court, the Court permitted the appellants to raise the issue for the first time in this Court. *Id.* at 235. In addition, the Court noted that had the Supremacy Clause challenge been made in the district court, that challenge, ultimately, would have been rejected. *Id.*

The question presented to this Court in the petition is the same question which was presented to both the District Court and Court of Appeals: Can the State of Texas Constitutionally exercise *in personam* jurisdiction over Petitioner? More specifically, the question presented to this Court is the Fifth Circuit's approach to resolving the *in personam* jurisdiction question, which Petitioner contends resulted in the District Court and Court of Appeals incorrectly concluding that the State of Texas had *in personam* jurisdiction over Petitioner.

In *Youakim*, this Court permitted the appellants to raise a *separate* constitutional challenge for the first time in this Court, whereas in the case at bar Petitioner has *always* maintained in the federal courts below that the State of Texas did not have *in personam* jurisdiction over Petitioner. In framing the issue for this Court to review, Petitioner has focused on the means utilized by the courts below which Petitioner contends resulted in the unconstitutional exercise of *in personam* jurisdiction over Petitioner. Therefore, Respondent's contention that Petitioner is raising the issue in its petition for the first time in this Court is without merit. Respondent requests that this Court sacrifice substance for form; however, *Youakim* precludes that approach to avoid this Court's review. *Id.*

In addition, Respondent contends that because Petitioner did not request oral argument or an evidentiary hearing in the District Court, Petitioner has not preserved the error complained of in the petition. (Brief in Opposition at 9-10). However, for the reasons stated above and as will be demonstrated below in Paragraph 4, this contention is without merit because the District Court's Local Rule 300-5(h) ("Local Rule") is in direct conflict with Rule 43(e) of the Federal Rules of Civil Procedure ("FRCP").

2. THERE IS A CONFLICT BETWEEN THE CIRCUITS ON THE QUESTION PRESENTED BY PETITIONER

In analyzing the conflict between the Circuits, with regard to ruling on a Rule 12(b)(2), FRCP, motion to dismiss for lack of *in personam* jurisdiction, the relevant point which must be made is that the Second, Sixth and Ninth Circuits apply different burdens of proof and procedures when there exists factual disputes and/or issues of credibility. Those Circuits recognize the reality that if a *prima facie* standard of proof is applied without regard to factual disputes and/or issues of credibility, *in personam* jurisdiction will always be established.

For example, in the Ninth and Sixth Circuits the approach to a Rule 12(b)(2), FRCP, motion to dismiss is:

> If the pleadings and other submitted materials raise *issues of credibility or disputed questions of fact* with regard to jurisdiction, the district court *has* the discretion to take evidence at a *preliminary hearing* in order to resolve the contested issues. [citations omitted] In this situation, where plaintiff is put to his full proof, plaintiff

> *must establish the jurisdictional facts by a preponderance of the evidence,* just as he would have to do at trial.

Data Disc, Inc. v. Systems Tech. Assoc., Inc., 557 F.2d 1280, 1285 (9th Cir.1977); *Welsh v. Gibbs*, 631 F.2d 436, 438-39 (6th Cir.1980) (emphasis added).

Similarly, the Second Circuit employs the following approach:

> In deciding a pretrial motion to dismiss for lack of personal jurisdiction a district court has considerable leeway. It may determine the motion on the basis of affidavits alone; or it may permit discovery in aid of the motion; or it may conduct an evidentiary hearing on the merits of the motion. [citations omitted] If the *court chooses* not to conduct a full-blown evidentiary hearing on the motion, the plaintiff need only make a *prima facie* showing . . . Eventually, of course, the plaintiff must establish jurisdiction by a preponderance of the evidence either at a *pretrial hearing* or at trial.

Marine Midland Bank, N.A. v. Miller, 664 F.2d 899, 904 (2nd Cir.1981) (emphasis added).

In contrast to the Second, Sixth and Ninth Circuits, the Fifth Circuit applies a *prima facie* burden of proof, regardless of the extent of factual disputes and/or issues of credibility, and regardless of whether or not there is a hearing on the motion. *Union Carbide Corp. v. UGI Corp.*, 731 F.2d 1186, 1189 & n. 4, 1190 (5th Cir.1984) (hearing held and *prima facie* burden of proof applied to find *in personam* jurisdiction); *Products Promotions, Inc. v. Cousteau*, 495 F.2d 483, 489 & n. 5, 490 & n. 7, 491 & nn. 8 & 9 (5th Cir.1974) (hearing held and the court applied a *prima*

facie burden of proof); *Jetco Electronic Industries v. Gardiner*, 473 F.2d 1228, 1232 & n. 4 (5th Cir.1973) (this case indicates that a *prima facie* burden of proof is the proper standard to be applied, even if there is a hearing on the motion, but at trial a preponderance of the evidence burden of proof must be applied); *D.J. Investments v. Metzeler Motorcycle Tire*, 754 F.2d 542, 545-46 (5th Cir.1985).

The above cases demonstrate that the Second, Sixth and Ninth Circuits recognize that there is no bright line approach for deciding whether or not there is *in personam* jurisdiction over a non-resident defendant. This observation is further supported by the approach adopted by the Second Circuit, wherein the district courts may go so far as to order that additional discovery be conducted to aid the court's determination. This approach evinces the Second Circuit's concern with the truth finding process, inasmuch as it relates to ascertaining whether or not there are *credible* facts which support the exercise of *in personam* jurisdiction. Furthermore, when there exists factual disputes and/or issues of credibility, the Second, Sixth and Ninth Circuits may order an evidentiary hearing wherein the court must resolve any disputed matters by a *preponderance* of the evidence. This clearly evinces those Circuits' unwillingness to blindly adhere to a rigid rule, such as the one applied by the Fifth Circuit, which inevitably results in the exercise of *in personam* jurisdiction over the non-resident defendant.

It is evident from the foregoing cases that the Second, Sixth and Ninth Circuits apply different burdens of proof and employ different procedures than those of the Fifth Circuit; therefore, Respondent's contention that there is no conflict between the Circuits is without merit.

3. THE PROCEDURE AND BURDEN OF PROOF APPLIED BY THE FIFTH CIRCUIT COURT OF APPEALS DOES NOT COMPORT WITH CONSTITUTIONAL DUE PROCESS REQUIREMENTS

It is evident from the foregoing cases, that when ruling on a Rule 12(b)(2), FRCP, motion to dismiss for lack of *in personam* jurisdiction, the Fifth Circuit applies a *prima facie* burden of proof regardless of the existence of factual disputes and/or issues of credibility, and regardless of whether or not there is a hearing on the motion. The one and only time that the Fifth Circuit requires that a burden of proof greater than *prima facie* should be applied is when the case is a trial, at which time a preponderance of the evidence is the burden of proof which is applied.

To adopt the Fifth Circuit's approach to ruling on a Rule 12(b)(2), FRCP, motion to dismiss would result in an insurmountable burden for the non-resident defendant to overcome. When substantial factual disputes and/or issues of credibility exist, an evidentiary hearing should be held and, as the Second, Sixth and Ninth Circuits already require, the burden of proof applied must be a preponderance of the evidence. To do otherwise would offend traditional notions of fairplay and substantial justice. *International Shoe Company v. State of Washington*, 326 U.S. 310 (1945).

4. PETITIONER DID NOT WAIVE ITS RIGHTS FOR REVIEW BY THIS COURT BY FAILING TO REQUEST ORAL ARGUMENT OR AN EVIDENTIARY HEARING

In its Brief In Opposition, Respondent contends that Petitioner's failure to request oral argument or an

evidentiary hearing resulted in Petitioner's waiver of its rights for review by this Court. (Brief In Opposition at 8-10).

When Rule 43(e), FRCP, and the Local Rule are juxtaposed, it becomes evident that the Local Rule places the responsibility on the moving party to request an evidentiary hearing, whereas Rule 43(e), FRCP, places the responsibility with the court. The practical effect, as Respondent points out, is a waiver when the moving party fails to request a hearing. The Second, Sixth and Ninth Circuits do not employ such a rule. Moreover, the decision as to whether or not to conduct an evidentiary hearing is a decision which must be made by the *court* not the moving party (see *Data Disc, Inc., supra,* 557 F.2d at 1285; *Welsh, supra,* 631 F.2d at 438-39; *Marine Midland Bank, N.A., supra,* 664 F.2d at 904). To do otherwise would defeat the purpose of Rule 43(e), FRCP, which clearly places the discretion in the court to order a hearing on the motion. Finally, even if a hearing would have been requested by Petitioner the result would have been the same: the District Circuit would have applied a *prima facie* standard and *in personam* jurisdiction would have been exercised over Petitioner.

It is clear from the foregoing cases and Rule 43(e), FRCP, that the *court* not the moving party is placed with the responsibility of deciding whether or not to conduct an evidentiary hearing. Therefore, to the extent that the Local Rule of the District Court below places that responsibility on the moving party it should be held to be invalid.

Based on the foregoing, Respondent's contention that Petitioner waived its rights for review by this Court is without merit.

CONCLUSION

For the foregoing reasons, Champion Mortgage Company respectfully requests that this Court grant its Petition for Writ of Certiorari.

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DATED: December 28, 1989